

CITATION: Canadian Constitution Foundation v Attorney General of
Canada, 2021 ONSC 2117

COURT FILE NO.: CV-21-658538

DATE: 20210322

ONTARIO SUPERIOR COURT OF JUSTICE

RE: CANADIAN CONSTITUTION FOUNDATION, *et al.*,
Applicants

-and-

ATTORNEY GENERAL OF CANADA, Respondent

BEFORE: FL Myers J

COUNSEL: *Jonathan Roth*, for the Applicants

James Todd and Mahan Keramati, for the Respondent

HEARD: March 19, 2021

ENDORSEMENT

This Motion Proceeding

- [1] The applicants request an interim injunction restraining the application and/or operation of ss. 1.2(1)(a)(ii)(B), 3(1)(a), and 3(1.3) of the Order in Council PC No. 2021-0075, dated February 14, 2021, entitled *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations)*.
- [2] Simply put, they ask the court to stop the government from requiring people who return to Canada by airplane from having to quarantine at their own expense in a hotel while waiting for the results of a COVID-19 test taken on their arrival in Canada.
- [3] The applicants allege that the new quarantine rules violate their fundamental human rights under the *Charter of Rights and Freedoms*.

- [4] Our rights are never more fragile than in times of national emergency. In our shared zeal to defend the country from an enemy – human or viral – it is all too easy to trample over individuals’ rights. Whether one considers the FLQ crisis or the internment of Japanese Canadians and Americans during WWII, western history is studded with examples of egregious wrongs being committed to individuals in the name of public safety during emergency times. But our shared constitutional rights and freedoms are vital threads in the fabric of our democratic, pluralistic society. Our efforts to preserve and protect Canadian society in times of emergency necessarily include jealously clinging to and safeguarding our rights and freedoms.
- [5] The constitutionality of the quarantine rules is not being decided today. All that is to be decided by me at this early stage of this lawsuit is whether the quarantine rules should be enforced during the next few weeks while the lawyers ready themselves for the hearing by this court of the constitutional questions on their merits.
- [6] However, even a few weeks is a long time if people are or may be deprived of their constitutional rights and freedoms in the interim.
- [7] The applicants do not challenge the lawfulness of the mandatory quarantine of travellers who arrive in Canada. In fact, they argue, that a *longer* quarantine period might be more constitutionally sound because it would better accord with the purpose of the quarantine to stop the spread of COVID-19 and its variants.
- [8] The applicants challenge only the government’s requirements that:
- a. Prior to boarding the plane to return to Canada, travellers show the airline evidence of prepaid accommodation that enables them to remain in quarantine at a government-authorized accommodation for a three-day period that begins on the day on which they enter Canada;
 - b. All travellers who enter Canada by air and who do not have symptoms of COVID-19 must quarantine themselves without delay at a government-authorized accommodation in accordance with the instructions provided by a screening officer or quarantine officer and remain in quarantine until they receive the result for the COVID-19 molecular test; and

- c. The quarantine at the government-authorized accommodation is at the travellers' own expense unless the government-authorized accommodation is provided or paid for by Her Majesty in right of Canada or an agent of Her Majesty.

- [9] The applicants do not challenge the requirement that people obtain a COVID-19 test before they board their planes to come home or that they be tested again when they land in Canada. They do not oppose the requirement that people who enter Canada to quarantine for 14 days in a suitable manner and location. They just challenge the requirement that people who arrive by air must pay for government-approved hotel accommodation and stay there until they get their COVID-19 test results.
- [10] The applicants submit that the cost of hotel accommodation prevents them from travelling abroad to see loved ones who are in need of assistance during the pandemic. They argue that the cost prevents them from leaving or returning to Canada freely. They say the requirement to quarantine for a few days in a hotel has no public benefit and deprives them of liberty for no reason at all. It amounts to unconstitutional arbitrary detention or cruel and unusual punishment. They say they are treated differently than people who arrive by car who are allowed to quarantine at home.
- [11] The applicants give special emphasis to their argument that, under the emergency law, people who test positive for COVID-19 are released from the government-authorized hotels to implement the rest of their 14-day quarantine plans just like people who receive a negative test result at the hotel. They argue that the imposition of the hotel requirement has no real purpose, no public benefit, no support in science, and is too costly.
- [12] Despite my heightened sensitivity to threats to Canadians' fundamental rights and freedoms during an emergency, the outcome of the motion is actually quite straightforward. There is a well-known, three-part test that the applicants need to meet to obtain an injunction to stop a law from being applied pending a constitutional review. The applicants meet only one of the three tests and barely at that.
- [13] I have great sympathy with the family issues being suffered by the applicants which make them want or need to travel abroad. The pandemic has kept thousands or tens of thousands of families away from

ill and dying loved ones here in Canada too. But the applicants' wish to choose to quarantine at home or to stay for free at a hotel, and their spending priorities when they travel abroad during the pandemic, are decidedly first world, economic problems. They are principally money issues that barely raise any discernible constitutional concern.

- [14] The only constitutional issue that I can perceive in this proceeding is whether the requirement to quarantine in a hotel is a restriction on peoples' liberty without any real basis in science or public benefit.
- [15] However, as discussed below, the government's evidence at this stage is deeply-rooted in science and comprehensive public policy development. The applicants are not asserting facts when they submit that people with positive COVID-19 tests are treated the same as those with negative test results in government-authorized hotels. Their feelings that they can quarantine at home safely are challenged by the best available scientific data. Moreover, while they would like air travellers to be treated like people who arrive in Canada by car, the evidence says they pose different risks.
- [16] The episodic and anecdotal concerns raised by the applicants barely raise an issue in face of the actual evidence that has been adduced by the government to this point.
- [17] I must bear in mind that the constitutional issues are not before me for resolution today. More evidence may be adduced by the parties. They may also cross-examine each others' witnesses before the return of the application on its merits.
- [18] On the three injunction questions that are before me today, for the reasons set out below:
 - a. There is the narrowest of serious issues to be tried raised under s. 7 of the *Charter*;
 - b. The applicants will not suffer irreparable harm in the few weeks leading up to the hearing of this application on its merits;
 - c. The balance of convenience, including the public interest in preventing the spread of COVID-19 and, especially, its variants, overwhelmingly supports the refusal of injunctive relief at this time.

[19] The motion is therefore dismissed.

The Applicants' Sympathetic Circumstances

[20] I am only going to deal with the facts as needed to resolve this motion. But I think it is important to recognize the sincere views of the applicants and the sympathetic situations in which they find themselves.

[21] Mr. Radonjic lives in BC. His spouse lives near Seattle, WA. Mr. Radonjic has driven to see her several times during the pandemic. Each time, he has quarantined at home upon his return to Canada. The Americans no longer allow Mr. Radonjic to enter into the US by car. He has flown to see his spouse several times as well.

[22] Mr. Radonjic's spouse suffered a workplace injury last July. She is undergoing physical therapy and likely needs surgery. She requires assistance with basic tasks. Mr. Radonjic was planning to go see her but has cancelled his plans "because of the hotel quarantine requirements and in particular the associated costs." He says:

7. The cost of the hotel quarantine is prohibitive for me. Since my wife has been unable to work due to her injury, I have been supporting both of us. I have also incurred thousands of dollars of expenses to fly back and forth to the Seattle area (which was previously an inexpensive trip by car over the U.S. - Canada land border). It is simply not within my means to pay \$2,000 or more to quarantine in a hotel rather than in my own home.

8. The costs associated with quarantining in government-approved accommodation are of particular concern to me because I am willing and able to quarantine safely and effectively at home - as I have done repeatedly following my previous trips to the United States.

* * *

10. If the injunction that the Applicants seek is not granted by the Court, I will have permanently lost the opportunity to be with - and perhaps more importantly, assist and care for - my wife during this very difficult time.

[23] Ms Heritte lives in Quebec. She testifies that she is responsible for the financial and health care of her 92-year-old mother who lives in France. Ms. Heritte's mother suffers from dementia and lives in an assisted-living facility.

[24] Ms. Heritte testifies:

5. The reality is that my mother's situation could easily deteriorate at any time, requiring me to travel to France on short notice. I am worried about my ability to travel in light of the substantial cost of the hotel quarantine requirements (coupled with the other, additional costs of multiple COVID-19 tests, etc.). However, I expect that if absolutely necessary, I would travel to France despite the hotel quarantine requirements and incur the associated cost.

6. To the extent that the hotel quarantine rules are keeping me from travelling sooner to be with my mother, I am losing out on the little time that I have left to spend with her. As her situation is precarious - based on her health condition I believe she may not survive the year - I may be unable to see her again before her passing.

[25] Like Mr. Radonjic, Ms. Heritte too links her economic concern to her assertion that she can quarantine safely on her own as she has done before:

7. The cost of the hotel quarantine is particularly concerning for me because I am able to safely and effectively quarantine outside of government-approved accommodation. When I last traveled to France in 2020, I quarantined when I returned in my father-in-law's cottage. I could quarantine there again, alone, if I were to travel to France again.

[26] Mr. Forman lives in BC. His 84-year-old father lives in New Orleans, LA. He has terminal lung cancer and is unlikely to survive past September.

[27] Mr. Forman says that he was planning to visit his father in March, 2021 and to take his son to say his last good-byes. He also expects to have to go there to arrange the funeral. He testifies that after prior trips, he quarantined at home without incident:

7. The cost of the hotel quarantine is very significant for me. My wife is a nurse and we have a modest income. It would be very difficult for us to pay to quarantine in a hotel, particularly because we may well need more than one room.

[28] Shane O'Neill resides in BC. In February of this year, he went to Ireland to visit his terminally ill father. His father passed away while Mr. O'Neill was in Ireland. He remained there for two more weeks to deal with his father's affairs.

[29] Mr. O'Neill wanted to fly home through Toronto as this was the most economical and the shortest flight. To avoid quarantining in a hotel in Toronto, Mr. O'Neil flew directly to Vancouver. The hotel did not accept his booking and made him re-book under the government-approved program. He had to pay just over \$1,772 for less than 22 hours in the hotel until he received the results of his COVID-19 test. He testifies:

11. The costs associated with quarantining in government-approved accommodation are of particular concern to me because I am willing and able to quarantine safely and effectively at home, where I am presently completing the remaining portion of my quarantine.

[30] Ms. Teixeira lives in Ontario. Her father passed away in Portugal in February. She flew to Portugal with her brother and daughter to arrange the funeral and to handle her father's affairs. While in Portugal, Ms. Teixeira was unable to book accommodation at a government-authorized hotel for their return despite investing a lot of time and effort and enduring infuriating bureaucratic runaround.

[31] When the Teixeiras returned to Toronto, they were required to make a booking for a hotel from the airport. They waited 90 minutes for approved transit which did not come. Eventually they took a cab to the hotel. There, they were provided with a bottle of water and a single vegetable sandwich each. The daughter was unable to obtain a vegetarian sandwich for lunch the next day. They ended up being charged almost double the quoted price and paid nearly \$2,400 for a three-night stay while they only actually stayed at the hotel for 24 hours. They received a partial refund from the hotel after sharing their story with the media.

- [32] Ms. Teixeira also testifies that her brother says that when he went to the hotel lobby there were dozens of people, some without masks, in a state of “complete pandemonium”.
- [33] All of these people suffered and are suffering loss and distress. In two cases, Ms. Teixeira and Mr. O’Neill, the events have already occurred. An injunction for the next several weeks does nothing for them. Neither Mr. Forman nor Ms. Heritte say that they cannot go on their trips without an injunction stopping the government quarantine law in the interim. They say it will be expensive especially because they can quarantine at home.
- [34] Mr. Radonjic says that he wants to go see his spouse and help her. He says that the costs are prohibitive. But he provides no financial evidence. Is he simply out of funds having spent thousands on plane fares previously and bearing the costs of caring for his spouse while he is not there? Is it the cost of quarantine that prevents him from going or, as I infer from the last sentence of para. 7 and para. 8 of his affidavit, are the costs especially galling given his ability to quarantine at home safely and effectively for free?

One Possible Serious Issue to be Tried

- [35] The first consideration for granting an injunction between now and the main hearing of the constitutional issues in a few weeks time, is whether the applicants raise any serious issues for resolution at that hearing. I do not agree with the government that the injunction sought would effectively resolve the entire case. Therefore, I am not required to apply a more stringent test.
- [36] As noted above, I am not deciding the constitutional issues today. I am just taking a peek at the evidence and arguments alleged to see if there are any claims made that are not frivolous. It is not a high hurdle for the applicants to surmount at this stage of the proceeding.
- [37] The applicants assert that their mobility rights under s. 6 of the *Charter* are breached by the government imposing limits on their ability to enter and leave Canada.
- [38] The applicants do not set out any legal basis in their factum to support a claim under s. 6 of the *Charter*. Health restrictions and regulatory processes are universally recognized aspect of entry into all countries.

Ms. Texeira's evidence confirms that she was allowed to enter Canada without having a pre-arranged reservation at a hotel. She was allowed to make a reservation from the airport. Others, like those who simply refuse to make reservations, may be taken to a government quarantine centre. The choice of whether to stay at a quarantine centre for free or to pay for a hotel (at varying price points) does not, at this stage at least, raise a serious issue of breach of mobility rights under s.6 of the *Charter*.

- [39] There is no legal basis raised by the applicants for the hotel quarantine order to be considered punishment, let alone anything cruel and unusual. Even if a hotel implements the program by providing poor quality service or foodstuffs, beyond the growing pains of the first few days of the program, that is hardly the stuff of cruel and unusual punishment. At worst, people are spending a few days cooped up in a hotel room for too much money. The claim that quarantine is arbitrary detention or cruel and unusual punishment is frivolous.
- [40] The only legal issue, to the extent there is one, is whether the requirement to quarantine in a hotel at one's own cost is a deprivation of personal liberty in violation of the principles of fundamental justice. Is it arbitrary, of no use, and of no public benefit?
- [41] The question is raised by all of the applicants implicitly when they say that the cost of the process is prohibitive when they could quarantine at home for free and just as well.
- [42] The applicants point to a statement by the Minister of Health to the Parliamentary Standing Committee on Public Safety and National Security on March 10, 2021. She said:

I will just say this. The data is incomplete internationally. We are, as a world, trying to figure out what the best approach is to prevent the importation of COVID-19 and the accommodation of quarantine and testing. It is understudied.
- [43] Because the data is incomplete, the applicants argue that the government cannot show that there is any benefit in quarantining people for up to three days to await their COVID-19 tests. They cannot show that it works better than people staying at their own homes.

- [44] The applicants argue that the process is under-inclusive because it only covers air travel and not land-based entry into Canada. They argue that we are at higher risk of catching COVID-19 in government quarantine centres and hotels than in our own homes. They argue that there is no point to the hotel quarantine since people with positive COVID-19 tests are allowed to go home to finish their 14 day quarantine just like those with negative tests. They express fear drawn from a non-peer-reviewed article from New Zealand blaming a hotel quarantine for a large outbreak of the virus in that country.
- [45] The applicants argue that the Minister of Health told the Standing Committee that she was doing everything in her power to protect Canadian from the pandemic. But good motives alone are not a basis to violate peoples' rights without some basis to justify the public health benefits of the terms imposed.
- [46] In the paragraphs that follow, I paraphrase a large mass of evidence and lengthy, comprehensive submissions by the government's lawyer Mr. Todd at the hearing. The evidence is that the government has assembled highly credentialed scientists and public policy analysts to assess the problem. They work on studies here as well as communicating closely with other countries (including New Zealand and Australia) to learn from their experiences. In a nutshell, the government's principal goal is to delay the spread of COVID-19 and its variants from taking hold while we get vaccinated. The benefits of minimizing spread until we have enhanced immunity are obvious.
- [47] However, despite already requiring people to obtain negative COVID-19 tests before boarding planes to Canada, in January of this year, there was a three-fold increase in the flights arriving with COVID-19 positive passengers. People fly here from 192 countries. Not all test for COVID-19. Some have a black market with fake negative COVID-19 test results available for sale. Of greater significance, the new variants of the virus are more transmissible and induce more serious illness. Up to 40% of current positive tests are for variants. The prior process of just requiring tests before people boarded their planes was not working.
- [48] People who fly into Canada land at one of four international airports that are currently open to receive flights from abroad. People who arrive at these choke points then spread throughout Canada by boarding domestic flights. Or, they go home or to hotels nearby by public transport or in some cases, by private car.

- [49] By contrast, people who arrive at a land crossing are in private cars already. They are driving on to their destinations. They are not boarding domestic air flights with others. Neither will they need public transport. They do not present the same risk of spreading COVID-19 through mass transit to the farthest reaches of the country.
- [50] Plus, despite peoples' best wishes and belief in their own honest adherence to quarantine and social distancing protocols, the current best evidence from Alberta and McMaster University studies is that home quarantines still spreads the virus. Deaths of 71 people in a long-term care facility have been traced to a single person who was quarantining at home with someone who worked at the long-term care facility in the same household.
- [51] When a person receives a positive COVID-19 test under the emergency order, before they can leave the hotel, they have to meet with a Public Health Officer to discuss next steps. They can be released to home quarantine for the remainder of the 14 days if the Public Health Officer is satisfied that doing so is appropriate. The Public Health Officer will assist people find safe quarantine locations if they do not have one available to them. They can also require the COVID-19 positive person be confined to a government quarantine centre if necessary.
- [52] The use of a hotel for quarantine thereby provides a buffer before arriving passengers are released into the general population. This allows health officials to exercise control and provide a rapid response to COVID-19 positive cases.
- [53] Moreover, there has not been a single case of COVID-19 transmission reported at any designated quarantine facility or any government-authorized hotel throughout the entire pandemic. The facilities are subject to stringent rules aimed at protecting people from the spread of the disease. That's the whole point of quarantine. The government acknowledges that there were several days of growing pains at the time emergency order hotel process was first implemented. It seems that this is under control although high costs still remain bothersome to be sure.
- [54] Mr. Todd accepts that there is no definitive data as yet. The government cannot release one-half of the arriving passengers into the population to conduct a double-blind study to determine if limited hotel quarantine is more effective than no hotel quarantine. Instead, the government follows

the precautionary principle of taking measured steps to put up shields that protect Canadians from incoming bursts of COVID-19 and its variants. The government is not willing to be draconian. It could theoretically stop the pandemic if absolutely everyone was quarantined perfectly and completely for 14 days. Instead, the government is imposing increasingly restrictive, but narrowly tailored, measures as and when needed according to the experts who are studying the issues and the data.

- [55] The evidence before the court is that the first study results suggest that the use of the hotel quarantine does have some effect on reducing the incidence of spread of COVID-19 and, especially, new variants. The government's experts support the emergency regulation as a necessary but measured process to delay the spread further and to nip in the bud the sudden increase of imported cases on flights that arrived in January.
- [56] All of the foregoing is the untested evidence of the government's witnesses. It will be for the judge at the main hearing to make findings if he or she can do so. At this stage, I simply note that despite being the first off the mark and having as much time as they needed to bring this proceeding, the applicants have no real evidence to the contrary.
- [57] As mentioned above, the applicants' assertions on facts are unsupported. Despite people feeling free to share their opinions on social media, that does not make everyone's or anyone's opinion a fact. The applicants' true upset is that they are being made to spend money when they think they can quarantine at home safely and effectively. However, according to the data and the views of those with knowledge and experience studying the problem scientifically, and not just on Twitter, there are serious increased risks presented by arriving planes carrying a higher proportion of people with COVID-19 and variants. In addition, quarantining at home has not proven as safe or effective at preventing the spread of COVID-19 as is necessary in the face of the emergence of variants.
- [58] It is hard to see where there is a liberty interest even raised by the applicants' subjective views of the value of hotel quarantine as compared to their home quarantine. But, until all the evidence is in and cross-examinations are completed, I have to allow the possibility that the government's evidence may be undermined by fresh evidence or through cross-examination.

- [59] I therefore find that there is a serious issue to be tried on whether there might be a breach of s. 7 of the *Charter*.

No Irreparable Harm

- [60] Since an injunction will only last a few weeks until the main hearing of the constitutional issues, the law says that an injunction is only needed if, in the period leading to the hearing, people will suffer losses that cannot be compensated later. Those losses are said to be irreparable. For example, if a person loses his or her business before they can get to a hearing, arguably an award of money damages at the hearing will not give them the equivalent of their business back.
- [61] None of the applicants have shown through non-speculative evidence that they are likely to suffer harm before the hearing of the constitutional issues that cannot be compensated in money damages. As noted above, two of the applicants have already traveled. The two who will travel anyway, but object to the expense, can be compensated in money damages. Mr. Radonjic's evidence that it is the cost of the quarantine hotel that makes further travel prohibitive for him is bald, unsupported, speculative, and unpersuasive on this issue.
- [62] Moreover, the applicants have claimed damages against the government under s. 24 of the *Charter*. While this is not a simple or immediately available remedy, the fact is that if the applicants are entitled to compensation for a breach of their *Charter* rights, they will get it.

The Balance of Convenience.

- [63] The third test for an injunction measures the relative harm of granting or not granting an injunction. If an injunction is not granted, people arriving in Canada by air will have to keep attending the hotels at their own expense for the next few weeks until the application is heard. Mr. Radonjic may not be able to afford to travel to see his spouse for a few more weeks. People who have to travel abroad will have to pay for their own quarantine when they return.
- [64] On what basis do the applicants ask all Canadians to pay the costs associated with the desire or need of a few to travel abroad during the pandemic? This is a question of government spending priorities. It is not an area into which the court general can or will venture.

- [65] Moreover, if an injunction is given to prohibit the enforcement of the three provisions outlined at the beginning of this endorsement, according to the scientists and policy-makers whose evidence is before the court, the steps that they believe are necessary and appropriate to stem the influx and spread of COVID-19, and especially variants, will be lost. Even if I thought that the applicants had a much stronger case on the merits than I do, I would be very reluctant to expose Canadians to the impact of the risk of further spread of the virus and its variants or to substitute my view for those of the experts who are in charge of the process.
- [66] If, after a full hearing, I found that rights of Canadian were being violated in a way that is not saved by s. 1 of the *Charter*, I would have no such reluctance. Nor would I be, nor am I today dissuaded from enforcing fundamental rights by the mere invocation of an “emergency” to justify draconian action by the government.
- [67] On the evidence before me so far, the government is being anything but draconian. It is employing the precautionary principle to take measured but needed steps to prevent or delay the variants from taking hold in Canada as vaccines are coming online.
- [68] The public interest assessment includes the desirability of deferring to the government in cases presenting a polycentric potential clash of rights.
- [69] In this case, the balance of convenience strongly favours the government and the public interest over concerns of the few people who find themselves wanting or needing to travel abroad during the pandemic and who wish to socialize the costs of containing the risks they represent to all upon their return.

Outcome

- [70] The motion is dismissed.
- [71] When this hearing was scheduled ten days ago, I did not expect that the government would file a complete evidentiary response by the time of the hearing. Therefore, this hearing was scheduled as an “interim” injunction. It was just intended to tide the parties over until the government could get ready for a full injunction hearing to consider whether an injunction should continue

until the main constitutional hearing. I expected the hearing would be a brief request for adjournment on terms. Instead, I heard a full injunction argument.

- [72] Through tremendous effort and some help from other litigation that is already underway elsewhere, the government has delivered a very full evidentiary record. The applicants might want to file more evidence. Both sides may want to cross-examine witnesses from the other side. But I do not see why the main constitutional hearing needs to await another injunction hearing. The three tests have been canvassed on the unchallenged evidence of both sides. Once the parties finalize the evidentiary record, the main constitutional questions can be heard and resolved.
- [73] The current government emergency quarantine order expires April 21, 2021. There is therefore some urgency to get to a hearing on the merits. Counsel are directed to arrange a case conference this week through my Judicial Assistant to discuss scheduling next steps.
- [74] Costs, if sought, are reserved to the final hearing of the application.

FL Myers J

Date: March 22, 2021